No. 03-1388

IN THE

Supreme Court of the United States

DOUGLAS SPECTOR, *et al.*,

Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE COMMONWEALTH OF THE BAHAMAS AND THE BAHAMAS MARITIME AUTHORITY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

The overriding question in this case is whether Congress, in enacting Title III of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, intended to engraft onto the robust body of international law governing foreign-flagged vessels an indeterminate code of American structural and design requirements that would attach to a foreign vessel as soon as she entered a United States port.[1] The Commonwealth of the Bahamas and the Bahamas Maritime Authority (collectively, The Bahamas) have a direct and substantial interest in the resolution of that question.

The Commonwealth of the Bahamas (Commonwealth) became an independent nation on July 10, 1973, following 325 years of British rule. The Commonwealth established a democratic state with a tripartite form of constitutional government in which the Queen of England is the titular Head of State. The Commonwealth is an active participant in the world community and a fully self-governing member of the United Nations, Commonwealth of Nations, Organization of American States, and Caribbean Community. The Bahamas Maritime Authority (BMA) is an arm of The Bahamas Ministry of Transport and Aviation. The BMA oversees the Bahamas Merchant Shipping Register, administers the laws governing vessels on that register, represents the Commonwealth in international organizations concerning maritime matters, and advises the Commonwealth on maritime matters. The BMA has offices in Nassau, London, and New York, and agents in Tokyo.

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[1] Pursuant to S. Ct. Rule 37.6, The Commonwealth of The Bahamas and The Bahamas Maritime Authority state that no part of this brief was authored by counsel for any party, and no person or entity other than the amici curiae made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties.

First discovered by Christopher Columbus in 1492, The Bahamas comprise an archipelago of some 700 islands located along prime shipping lanes in the Atlantic Ocean. The Bahamas has a rich maritime heritage and today has the world's third largest ship registry. More than 1300 vessels—over 100 of which are cruise ships—fly the Bahamian flag, including cruise ships operated by the respondent in this case. BMA, Ship Registration Services 6-7 (2003). The Bahamas has more cruise ships on its registry than any other nation, but cruise ships comprise less than 10 percent of the vessels on The Bahamas' registry. *Id.* at 7. The Bahamas' registry comprises a full range of craft, including container ships, bulk carriers, reefers, and offshore oil and gas vessels. *Id.* The Bahamas is an active hub of international maritime trade and an important maritime gateway to the Americas.

The Bahamas has a well-established sovereign interest in each of the ships that fly its flag, which, at least figuratively speaking, are a part of her territory. "[T]he well-established rule of international law [is] that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That rule is based on the centuries-old understanding "that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of each state that owns her." *Lauritzen* v. *Larsen*, 345 U.S. 571, 585 (1953). Among other things, the flag state is responsible for determining how its vessels must be designed, built, and modified. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 502 cmt. b (1986). The Bahamas, like other maritime nations, carefully exercises that important sovereign authority.

The Bahamas has ratified every major convention on maritime safety, including the seminal Convention for the

Safety of Life at Sea (SOLAS), Nov 1. 1974, 32 U.S.T. 47.[2] The Bahamas is a member of the governing council of the International Maritime Organization (IMO), a specialized agency of the United Nations which is represented by 164 Member States and is responsible for developing international rules governing the safety and security of vessels. When a nation joins the IMO, it agrees to make its conventions part of its own law. The Bahamas has played a leading role on the governing council of the IMO in developing protocols and amendments designed to promote safety and uniformity in international maritime commerce. This overarching concern for maritime safety, coupled with a rigorous annual-inspection program to ensure that vessels on its register comply with Bahamas and international safety standards, has ensured that Bahamian-flagged ships are among the safest in the world. *See* Part B, *infra*.

The Bahamas—whose people are constitutionally committed to preventing discrimination, *see* Bahamas Const. art. III—ascribes to the aspirations of the ADA and supports the efforts of all vessel owners to prevent discrimination against individuals with disabilities. As a nation whose history and fortunes are inextricably intertwined with maritime commerce, however, The Bahamas is also deeply committed to the international fabric and law of nations governing shipping, including the rule that the "law of the flag" governs the internal affairs of the ship. To the extent that regulatory action is necessary to prevent discrimination

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[2] *See, e.g.*, Convention on Load Lines, 18 U.S.T. 1857 (1966); Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, July 7, 1978, 1361 U.N.T.S. 190; Convention on Facilitation on International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411; International Labor Organization, Convention Concerning Minimum Standards in Merchant Ships, No. 147, 15 I.L.M. 1288 (1976).

on vessels in United States ports or other ports around the world, an existing international framework—including the IMO—exists to act in a multilateral fashion that would avoid the undesirable prospect of one nation seeking to impose its own structural requirements on the ships of other nations and, even worse, the prospect of many nations imposing different or conflicting requirements in a fashion that could wreak international havoc for maritime nations.

SUMMARY OF ARGUMENT

International law was largely borne of the need for civilized societies to establish a uniform set of rules for shipping. For centuries, the law of nations has recognized that the law of the flag state generally governs the internal affairs of a ship, including the structure and design of the ship. That rule is based on the common-sense understanding that there must be some law that governs the internal affairs of the ship, and that maritime commerce would be stifled if the internal affairs of a ship were governed by a different set of laws every time it called on a new foreign port. This Court has long recognized the "cardinal importance" of the international "law of the flag," *Lauritzen* v. *Larsen*, 345 U.S. 571, 584-585 (1953), as well as the fundamental sovereign interest of foreign nations to regulate the internal affairs of vessels that fly their flag.

The Court will not construe an Act of Congress to apply to the "internal affairs" of foreign-flagged vessels that enter United States waters absent "'the affirmative intention of Congress clearly expressed.'" *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (quoting *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)). Congress has not clearly expressed any "affirmative intention" to subject foreign-flagged vessels that enter United States waters or its ports to a specialized code of American structural and design requirements. Nothing in the text of Title III of the ADA expressly calls for such regulation. Nor is there any indication in the voluminous legislative history of the ADA

that Congress weighed the likely international ramifications of subjecting foreign-flagged ships to such a regime. In order to avoid an unintended collision between United States law and the law of nations, this Court accordingly should hold that Title III does not apply to foreign-flagged vessels.

A contrary ruling would invite the international discord that the Court's clear-statement rule is designed to avoid. Applying Title III's general accessibility provisions to foreign-flagged ships would intrude on the sovereign authority that flag states, including The Bahamas, have traditionally exercised over the internal affairs of vessels on their registries, including with respect to matters of structure and design. It would also interfere with the active international body of law, including SOLAS, governing matters relating to ship design and structure. Not only would such a result draw the United States into potentially embarrassing international clashes, but it could precipitate enormous uncertainty and confusion on a global level. If the United States chose to apply its own accessibility standards to foreign-flagged ships entering its waters, many of the other 40 countries around the world with antidiscrimination laws might respond by attempting to apply their own unique—and divergent, if not contradictory—set of standards to foreign-flagged ships, including U.S. ships. International maritime commerce would run aground, as no vessel could possibly navigate such an unpredictable and stormy regulatory sea.

There is no reason for this Court to disregard the prospect for such international discord on the basis of petitioner's attack on the legitimacy of the Bahamanian flag. The United States has recognized that ships flying the Bahamanian flag are subject to the sovereign control of The Bahamas, and that the regularity of a registration may be questioned only by the flag state. Moreover, The Bahamas has developed a comprehensive regulatory scheme governing the vessels that it registers, which is interwoven with all the major international conventions governing maritime matters. The

Bahamas subjects its vessels to rigorous inspections and Bahamanian-flagged ships are recognized as among the safest in the world. In deciding this case, this Court accordingly should give full sovereign weight to the Bahamanian flag, not to mention the flags of other major maritime nations, which have the same interest in ensuring that the community of nations respects the law of the flag.

ARGUMENT

TITLE III OF THE ADA DOES NOT APPLY TO FOREIGN-FLAGGED VESSELS

Over centuries, the law of nations has come to recognize that seafaring vessels need to be governed by one set of laws, and that those laws typically are supplied by the flag state. The Bahamas carefully exercises that sovereign authority with respect to the vessels that fly its flag on waters the world over. The Bahamas recognizes that the United States Government, like the governments of all seafaring nations, has the sovereign authority to apply its own laws to the foreign-flagged ships that enter its territorial waters or ports. *See Patterson* v. *Bark Eudora*, 190 U.S. 169, 173 (1903); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812). The question before the Court is whether the United States Congress actually chose to exercise that authority when it enacted Title III of the ADA. The resolution of that question is of far-reaching concern to the maritime nations of the world including The Bahamas.

Petitioners and the United States argue that Congress intended Title III to apply to foreign flag vessels because "[n]othing in the statute *exempts* foreign-flagged ships * * * from Title III's non-discrimination and accessibility requirements." U.S. Br. 15 (emphasis added); Pet. Br. 31. That argument turns the settled rule of construction on its head. Under this Court's precedents and general principles of maritime law, it is presumed that "the law of the flag state ordinarily governs the internal affairs of a ship," *McCulloch*, 372 U.S. at 21, even when that ship calls on foreign ports.

That heavy presumption will prevail unless Congress has "clearly expressed" an "affirmative intention" to apply domestic law to foreign-flagged vessels. *Benz*, 353 U.S. at 147; *see McCulloch*, 372 U.S. at 21-22.

Title III lacks such a clear statement. Nowhere does the Act refer to foreign-flagged ships. Nor is there any mention in the text of the ADA—or even in the more than 3000 pages of accompanying legislative history—that Congress weighed the "possibilit[y] of international discord" (*Benz*, 353 U.S. at 147), or risk of "retaliative action" (*id.*), that would ensue if Congress applied Title III to foreign-flagged ships. Nor did Congress receive testimony from officials of the Department of State, or invite the testimony of representatives of foreign governments, as to the ramifications of applying Title III to foreign-flagged ships, as Congress often does when it legislates in the "delicate field of international relations." *McCulloch*, 372 U.S. at 21. In the absence of such a clear statement, there is no reason to construe Title III in a manner that would invite international discord and confusion.

A. The Law Of Nations Has For Centuries Recognized That The Law Of The Flag State Generally Governs The Internal Affairs Of A Vessel

In considering claims that United States law applies to foreign-flagged ships, this Court has emphasized that federal statutes will "be applied by the courts to * * * foreign ships * * * only in accordance with the usual doctrine and practices of maritime law." *Lauritzen*, 345 U.S. at 581; *see McCulloch*, 372 U.S. at 19 n.9; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 381-384 (1959); *Benz*, 353 U.S. at 142. Two customary maritime doctrines and practices are particularly relevant here. The first is that the nationality of a ship is determined by its registry and its flag. *Lauritzen*, 345 U.S. at 584; *see St. Clair* v. *United States*, 154 U.S. 134, 151-152 (1894); *Ross* v. *McIntyre*, 140 U.S. 453, 472-473 (1891); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 501. The rule of the "flag" is

significant because "[t]he ascription of nationality to ships is one of the most important means by which public order is maintained at sea." R.R. CHURCHILL & A.V. LOWE, THE LAW OF THE SEA 257 (3d ed. 1999). The second principle, which follows from the first, is that the universal practice among maritime nations is to "give[] cardinal importance to the law of the flag." *Lauritzen*, 345 U.S. at 584. This is, in fact, "[p]erhaps the most venerable and universal rule of maritime law." *Id.*; *see McCulloch*, 372 U.S. at 21; *Romero*, 358 U.S. at 382-384; *see also* E. VATTEL, LAW OF NATIONS, Bk. 1, c. 19, § 216 (Joseph Chitty ed. 1852) (1758).

Together, these bedrock principles of international law give rise to the operative rule in this case: that "the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch*, 372 U.S. at 21. As this Court has observed:

> From experience * * * it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew toward the vessel, or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and *all things done on board, which affected only the vessel* or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require.

Mali v. *Keeper of Common Jail (Wildenhus's Case)*, 120 U.S. 1, 12 (1887) (emphasis added).[3]

[3] *Accord United States* v. *Rodgers*, 150 U.S. 249, 260 (1893) ("The general rule is that the country to which the vessel belongs will exercise jurisdiction over *all matters affecting the vessel*, or those belonging to her, without interference of the local government, unless they involve its peace, dignity, or tranquility, in which case it may assert its authority.") (emphasis added); *United States* v. *Flores*, 289 U.S. 137, 158 (1933).

This "well-established rule of international law" dates back centuries. *McCulloch*, 372 U.S. at 21. Indeed, long before this Court formally endorsed it, the rule had already "been supported by writers on international law, and ha[d] been recognized by France, Belgium, and other continental countries, as well as by England and [the executive branch of] the United States." *United States* v. *Flores*, 289 U.S. at 157 (citations omitted). In addition, as the United States has explained to this Court, the rule is "reflected not only in the settled decisions of this Court, but also in the Treaties of the United States and the regulations of the State Department." *McCulloch*, *supra*, Br. for the United States as Amicus Curiae, at 43 (*McCulloch* U.S. Br. 43) (footnote omitted).

Without a reciprocal arrangement by which all nations defer to a flag state's regulations affecting a ship's "internal affairs," the essential functions and operations aboard a vessel could abruptly change at every port of call. And that is assuming that they even could change. After all, there are a number of shipboard operations that are so fixed and integrated—ship structure and design being two—that they simply could not change from port to port. As this Court has observed in a similar vein, such an unpredictable regime would create "not only an onerous but also an unduly speculative burden, disruptive of international commerce and without basis in the expressed policies of this country." *Romero*, 358 U.S. at 384; *see also* Note, *The Effect of United States Labor Legislation on the Flag-of-Convenience Fleet*, 69 Yale L.J. 498, 504 (1960) ("The absolute power of the coastal state [to regulate foreign vessels] is tempered * * * by the demands of comity among nations, which require it to exercise a high degree of self-restraint, particularly in matters involving the 'internal economy' of a foreign vessel.").

B. The Bahamian Flag Is Entitled To The Full Weight Of Sovereignty Under The Time-Honored Law Of Nations Giving Cardinal Importance To The Flag

In light of the settled international rule that the "law of the flag" governs the internal affairs of the ship, all maritime nations that register vessels have a fundamental sovereign interest in the regulation of the vessels that fly their flag. The Bahamas exercises that sovereignty and responsibility with great care and, in doing so, has played a leading role in the development of international law designed to promote maritime safety and other matters. The Court should reject petitioners' unfounded suggestion that the Bahamian flag enjoys "little if any genuine sovereignty," Br. 31, and that foreign flagging is a mere "facade." Br. 2, 7.

The United States and The Bahamas have signed treaties and understandings regarding maritime commerce in which the United States has recognized that ships registered with The Bahamas and flying The Bahamian flag are subject to the sovereign control of The Bahamas. *See* Agreement Effected by Exchange of Notes, Oct. 5, 1982, 35 U.S.T. 3843. Moreover, "[t]he United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state." *Lauritzen*, 345 U.S. at 584. That position accords with the law of nations. *See*, *e.g.*, Law of the Sea Convention, art. 94(6); *cf. Muscat Dhows Case*, 2 Am. J. Int'l L. 921 (Fr. 1908) ("Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe rules covering such grants."). Accordingly, it is telling that the United States does not join petitioners' unavailing effort to demean the Bahamanian flag.

More than just U.S. diplomatic practice and policy confirm that The Bahamas is not a "flag of convenience." The United Nations Convention on the Conditions for Registration of Ships, which was drafted "to tighten the conditions under which * * * 'flags of convenience'[] would be allowed to

register ships," RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 501 rep. note 7, identifies several significant steps that a responsible flag state must take. *See* U.N. Convention on the Conditions for Registration of Ships, Feb. 7, 1986, art. 5, 26 I.L.M. 1229 (1987) (Ship Registration Convention).[4] The Bahamas has taken them all. For example, the Convention provides that each ship must be "periodically surveyed by [the flag state's] authorized surveyors in order to ensure compliance with applicable international rules and standards." *Id.* art. 5(3)(b). Under Bahamian law, all Bahamian-flagged ships must undergo an annual inspection. *See* BMA, BMA Information Bulleting No. 10, *available at* <http://www.bahamas maritime.com/ index.htm>. This inspection examines more than 150 discrete aspects of ship safety and design—including the ship's machinery, safety equipment, manning arrangements, certificates, documentation, charts, and other navigational equipment. *See* Guidelines For BMA Approved Inspectors (App. 12-39). By establishing the BMA to administer these inspections, The Bahamas has thus satisfied the Convention's requirement that a "flag State shall have a competent and adequate national maritime administration" to ensure that its ships comply with all "applicable international rules and standards." Ship Registration Convention, art. 5(1), (3)(a).

By scrupulously enforcing these safety and design standards, The Bahamas not only ensures the integrity of its ships, but also effectively deters less reputable ship operators from seeking to join the registry in the first place. Indeed, The Bahamas purposefully charges an initial registration fee that "is higher than that of some other registers" precisely as a way "to discourage less reputable operators." BMA, Ship Registration Services 13 (2003). Moreover, to ensure that The Bahamas remains a premier registry, every ship operator

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[4] The Ship Registration Convention is not yet in force, but nonetheless remains an instructive statement of customary international law on registration requirements.

must produce more than two dozen different certificates, declarations, and applications designed to demonstrate the operator's reputability.[5] *See also* BMA, The Bahamas Flag State Performance Self-Assessment Form (summarizing The Bahamas' commitment to international standards and its performance record) (App. 1-11). And when there is an accident involving one of its vessels, the BMA conducts a detailed investigation. This comprehensive regulatory scheme has worked: over the past decade Bahamanian-flagged ships have ranked among the safest in the world.

More generally, petitioner's attack on the Bahamanian flag overlooks the active role that The Bahamas has played in the international framework governing shipping. As noted above, The Bahamas is a signatory to every major maritime convention. *See* note 2, *supra*. Moreover, The Bahamas occupies a seat on the IMO's governing council, which is "composed of the representatives of thirty-two States with the largest interests in the provision of shipping and international seaborne trade and other special interests in maritime transport or navigation." R.R. CHURCHILL & A.V. LOWE, *supra*, at 23. In that capacity, The Bahamas has played a leadership role in proposing and shaping new standards for shipping safety and design. *See* Part E, *infra*.

The Bahamas, in short, is a full-fledged member of the community of maritime nations. And its flag is entitled to the full weight of sovereignty and respect enjoyed by the flags of the other leading maritime nations of the world.[6]

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[5] These include SOLAS Certificates, Passenger Ships-Safety Certificates, Loan Line Certificates, Bills of Sale or Builder's Certificates, Certificates of Company Incorporation, International Tonnage Certificates, Declarations of Ownership, and Safe Manning Certificates. *See* BMA, Registration Requirements, *available at* <http://www.bahamasmaritime. com/index.htm>.

[6] The amicus law professor notes that The Bahamas relies on eight classification societies to inspect Bahamian-flagged ships. That does not undermine the sovereignty of the flag or the respect to which it is entitled. The U.S. Coast Guard relies on *five* of those eight classification societies in conducting U.S. inspections. *See* Classification Society Authorizations by the U.S. Coast Guard, *available at* <http://www.uscg.mil/hp/g-m/mse/acp/authorizations .htm>. Moreover, the eight societies that The Bahamas uses are all members of the International Association of Classification Societies—an organization that enjoys observer status at the IMO.

C. When Congress Legislates In This Delicate Field Of International Relations, It Intends For The Law Of The Flag State To Apply Unless It Clearly States Otherwise

The venerable rule that the law of the flag state governs the "internal affairs" of ships developed "from acceptance by common consent of civilized communities" over centuries. *Lauritzen*, 345 U.S. at 582; *see De Lovio* v. *Boit*, 7 F. Cas. 418 (Cir. Ct. D. Mass. 1814) (Story, J.); *The Sally*, 12 U.S. (8 Cranch) 382 (1814). Congress is presumed to be aware of that law of nations and to respect it. *See McCulloch*, 372 U.S. at 20 n.10; *see also EEOC* v. *Arabian American Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991). As Chief Justice Marshall famously declared, "an act of Congress ought never to be construed to violate the law of nations, if any other construction remains." *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In a series of cases, this Court has tailored the *Charming Betsy* canon to the "highly charged international" context of applying United States law to a foreign-flagged vessel and declared that it will not interpret an Act of Congress to apply to foreign-flagged vessels that enter the United States absent "'the affirmative intention of the Congress clearly expressed.'" *McCulloch*, 372 U.S. at 21-22 (quoting *Benz*, 353 U.S. at 147).[7]

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[7] Petitioners suggest that the canon of construction that gives cardinal importance to the law of the flag state should not apply if a foreign-flagged vessel has a particular a "U.S. nexus" (Br. 2, 36). That contention is without merit. In undertaking the jurisdictional determination whether foreign-flagged vessels are subject to

That rule of construction itself has deep roots in our nation's history and diplomatic practice. As early as 1842, Secretary of State Webster, in protesting the application of British colonial law to United States ships temporarily docked in the Bahamas (then under British rule), forcefully articulated the United States's view that a clear statement was necessary before one sovereign could legitimately apply its laws to foreign-flagged ships that enter its ports:

> A merchant-vessel enters the port of a friendly state * * * by the presumed allowance or permission of that sovereignty. This permission or allowance is founded on the comity of nations, * * * and this comity is part, and a most important and valuable part, of the law of nations to which all nations are presumed to assent until they make their dissent known. In the silence of any positive rule affirming, or denying, or restraining the operation of foreign

United States laws in U.S. territory, this Court's decisions have drawn a bright line based on whether a vessel is foreign-flagged. Substituting a "nexus" test for the foreign-flag test would subject this important jurisdictional determination to "a purely *ad hoc*" and factbound analysis that "would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in practice." *McCulloch*, 372 U.S. at 19. Especially in this sensitive area of international law, the threshold determination of what law applies should be subject to a clear and predictable rule.

This Court has employed a contacts-based approach in applying the Jones Act, 46 U.S.C. § 688, to individual cases. As the United States explained in *McCulloch*, however, "the choice of law to govern a maritime tort raises altogether different questions than a claim of jurisdiction to regulate [under a statute]." *McCulloch*, U.S. Br. 53. "Although the weighing of various 'contacts' is a recognized basis for choosing the law to govern the legal incidents of a single transaction," there is no basis for applying "shifting standards" for determining what law applies to vessels as they "move[] from the territorial waters of one nation to another." *Id.*

> laws, their tacit adoption is presumed, to the usual extent.

6 Webster's Works 303, 310 (letter to Lord Ashburton, Aug. 1, 1842).

Moreover, the clear-statement rule is an essential safeguard for ensuring that Congress, and not the courts, carefully weighs the "possibility of international discord" before extending United States law in this "delicate field of international relations." *McCulloch*, 372 U.S. at 21; *see also NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). Congress "alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain" in this sphere. *Benz*, 353 U.S. at 147. Before this Court will conclude that Congress has adopted a policy that departs from the usual comity and reciprocity exercised in this area of international law, it must be clear that Congress contemplated and affirmatively chose to place the United States on such a collision course.

D. Congress Did Not Clearly State An Intention To Displace The Law Of Nations Governing Vessels By Subjecting Foreign-Flagged Vessels To Title III Of The ADA

A proper application of the clear-statement rule in this case leads to the conclusion that Congress did not intend to apply Title III of the ADA to foreign-flagged ships. Nothing in Title III "clearly express[es]" any "affirmative intention" on the part of Congress to apply the Act's accessibility rules to such vessels. *Benz*, 353 U.S. at 147. Indeed, nothing in the Act, nor even its 3000-page legislative history, alludes to foreign-flagged ships, much less confirms that Congress weighed the potential for international strife and retaliatory action by subjecting foreign flagged ships to a specialized code of structural and design requirements. *See Benz*, 353 U.S. at 144 ("[N]o discussion in either House of Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress

intended the coverage of the Act to extend to circumstances such as those posed here."); *McCulloch*, 372 U.S. at 20.

Petitioners and the United States ground their contrary interpretation on generalized language of the ADA. In particular, petitioners and the United States point to the Act's definition of "commerce." *See* Pet. Br. 31-33; U.S. Br. 16-17. In *McCulloch*, however, this Court rejected an almost identical argument that the broadly worded definition of "commerce"—which also referred to "foreign commerce"—in the National Labor Relations Act established an "affirmative intention" to apply the Act to foreign-flagged vessels that enter the United States. *See* 372 U.S. at 15 n.3 (quoting 29 U.S.C. § 152(6)); *id.* at 19 (noting lack of "any specific language" establishing that "Act may be read literally as including foreign-flag vessels within its coverage"); *ARAMCO*, 499 U.S. at 251-252 (discussing *McCulloch*). What is more, in *McCulloch*, the United States, as amicus curiae, specifically urged the Court to adopt that construction of the Act. *See McCulloch* U.S. Br. 30.

Citing *Cunard Steamship Co.* v. *Mellon*, 262 U.S. 100, 124 (1923), petitioners and the United States argue that Title III must be construed to apply to foreign-flagged cruise ships in order to create "a comprehensive ban on discrimination against individuals with disabilities throughout the nation." U.S. Br. 17; Pet Br. 29-30. *Cunard* considered whether the National Prohibition Act applied to foreign-flagged vessels that enter United States ports. The Court answered that question in the affirmative, but there are at least two key distinctions between this case and *Cunard*. First, the National Prohibition Act expressly excepted shipping in the Panama Canal Zone. 262 U.S. at 128. Based on that textual exception, the Court reasoned that Congress intended the Act "to be operative throughout the territorial limits of the United States, *with the single exception stated in the Canal Zone provision*," and "to apply to all merchant vessels, whether foreign or domestic, within those waters." *Id.* at 128-129

(emphasis added). There is no comparable textual statement in Title III of the ADA. Second, contraband—like alcohol, during prohibition, or controlled substances today—presents unique enforcement concerns. Any domestic opening in the enforcement scheme may defeat an *entire* prohibition effort. Congress's admirable effort to prevent discrimination against the disabled on the land, and even on domestic ships, would not be circumvented if Title III did not apply to foreign ships. And, by not extending Title III to such ships, Congress avoided potential international discord and retaliation.

Petitioners and the United States suggest that the "dearth of U.S.-flagged cruise ships * * * means that Congress would *ipso facto* have intended [Title III] to apply to *foreign-flagged* cruise ships operating in U.S. waters." Pet. Br. 32 (emphasis in original); U.S. Br. 15-16. That surmise falls far short of the requisite clear statement. In any event, Title III has an extensive application to businesses and public places in the United States other than foreign-flagged ships. There is no reason to think that Congress believed that the objectives of the Act would be thwarted if it did not extend it to foreign-flagged vessels. Moreover, the settled rule that United States law does not displace the law of the flag does not ebb and flow based on the percentage of foreign-flagged vessels in United States waters. Nor do the international concerns about applying United States law to foreign-flagged vessels evaporate once the number of foreign vessels in United States waters reaches a certain level.

In the Ports and Waterways Safety Act of 1972, Pub. L. No. 92-340, 86 Stat. 424, Congress *expressly* applied environmental regulations to foreign-flagged vessels, even though the vast majority of tankers operating in United States waters are foreign. *See id.* But Congress did not reach this conclusion lightly.[8] To the contrary, the Senate Report

[8] In fact, Congress delayed the effective date of the Act for more than a year so that the Secretary of Transportation could circulate the "proposed environmental protection rules and regulations with

indicated that "the inclusion of foreign-flag vessels entering the waters of the United States was a matter of some controversy during the hearings on the legislation." S. Rep. No. 92-724, at 22 (1972). Yet, unlike as to Title III of the ADA, Congress directly weighed the "justifiable concerns [that] were expressed about the unilateral application by the United States of standards on vessels of foreign registry." *Id.*

Statutes—like the Ports and Waterways Safety Act—that expressly assert jurisdiction over foreign-flagged ships "buttress[]" (*ARAMCO*, 499 U.S. at 258) the conclusion that Congress did not intend Title III to apply to foreign-flagged ships. *See also, e.g.*, 46 U.S.C. App. § 1903(c)(1)(C) (Maritime Drug Law Enforcement Act applies to "vessel[s] subject to the jurisdiction of the United States," including vessels "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States"); 15 U.S.C. § 1175(a) (making it unlawful to "manufacture, recondition, repair, sell, transport, possess, or use any gambling device * * * on a vessel * * * documented under the laws of a foreign country"); 46 U.S.C. § 10313(i) (Seaman's Wage Act applies to "a seaman on a foreign vessel when in a harbor of the United States"). These enactments demonstrate that Congress knows well how to extend United States law to foreign-flagged vessels when it wants to.

In short, petitioners and their amici have failed to show that Title III of the ADA contains the type of "affirmative intention" (*Benz*, 353 U.S. at 147) necessary to overcome the clear-statement rule in favor of applying the law of the flag.

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respect to vessel design to the appropriate international forums for consideration as international standards." *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 167 (1978) (citing 46 U.S.C. § 391a(7)(B)). This underscores how seriously Congress considers legislation that threatens to disrupt the normal rules of international comity.

E. Extending Title III To Foreign-Flagged Ships Would Disrupt A Vibrant Body Of International Law And Invite International Discord And Confusion

Since at least the *Charming Betsy*, this Court has carefully piloted its jurisprudence to avoid "unintended clashes between [United States] laws and those of other nations which could result in international discord." *ARAMCO*, 499 U.S. at 248. Such caution is especially appropriate here.

1. A uniform set of rules governing the design and structure of ships is essential at the global level.[9] That is why international law designates a *single* sovereign responsible for regulating each ship's design, safety, and structure—the state whose flag the ship flies. *See* Convention on the High Seas, Apr. 29, 1958, art. 10, 13 U.S.T. 2312 (High Seas Convention); United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 94, 1833 U.N.T.S. 397 (Law of the Sea Convention); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW § 502. Both the High Seas Convention and the Law of the Sea Convention provide that "[e]very State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard * * * to * * * [t]he construction, equipment and seaworthiness of ships." High Seas Convention, art. 10(c); *accord* Law of the Sea Convention, art. 94(3)(a); *see also* Law of the Sea Convention, art. 94(1) ("Every State shall effectively

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[9] This Court's admiralty and preemption precedents have recognized that—as a *domestic* matter—only one sovereign can effectively prescribe design standards for maritime commerce. *See Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674-675 (1982); *Sisson* v. *Ruby*, 497 U.S. 358, 362 (1990). Thus, the Court has on several occasions found that Congress has preempted state rules governing vessel designs because of the need for a "uniform federal regime" controlling such maritime matters. *United States* v. *Locke*, 529 U.S. 89, 111 (2000) (quoting *Ray* v. *Atlantic Richfield Co.*, 435 U.S. at 165). The need for such uniformity is exponentially greater when it comes to *international* shipping.

exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.").[10]

While this rule provides predictability by ensuring that ships will only have to comply with a single set of design rules, by itself it would do nothing to promote international uniformity, since each flag state would be free to apply its own idiosyncratic standards to its own vessels. Therefore, international law also provides that, in adopting rules for vessel design and structure, "each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance." High Seas Convention, art 10(2); *accord* Law of the Sea Convention, art. 94(5). The upshot of this well-established international regime—in which virtually all maritime nations, including the United States and The Bahamas, participate—is that the flag state remains at all times the single sovereign authorized to prescribe design rules, but in doing so, must ensure that those regulations meet a number of established international standards.

Those international standards arise from "a significant and intricate complex of international treaties and maritime agreements." *Locke*, 529 U.S. at 102. The principal source for international design and safety standards today is the 1974 SOLAS Convention, 32 U.S.T. 47.[11] Ratified by 137

[10] Although it has not yet ratified the Law of the Sea Convention, "[t]he United States has long accepted [the Convention] as embodying international law." U.S. DEP'T OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 675 (2001) (statement of Ambassador Sichan Siv, U.S. Representative on the U.N. Economic and Social Council).

[11] Some of the other major conventions that help contribute to the uniformity of international maritime law are: Convention on Load Lines, 18 U.S.T. 1857 (1966); Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459; International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, July 7,

nations—whose registries comprise together more than 98 percent the world merchant shipping fleet, R.R. CHURCHILL & A.V. LOWE, *supra*, at 273—SOLAS "contains a large number of complex regulations laying down standards relating to the construction of ships, fire-safety measures, life-saving appliances," and a half dozen other subjects. *Id.* Recognizing that international law assigns flag states responsibility for prescribing safety and design regulations, the Convention obligates all signatories to enact domestic laws and regulations incorporating SOLAS's comprehensive standards. Thus, for example, The Bahamas' Merchant Shipping Act expressly provides that the SOLAS Convention "shall have the force of law." Bahamas Merchant Shipping Act, ch. 246, § 185(6); *see id.* § 185(8) ("The Minister [of Transportation] may make such regulations as he considers appropriate to give effect to SOLAS * * *.").[12]

SOLAS was originally adopted in 1914 in response to the sinking of the *Titanic*. *See* R.R. CHURCHILL & A.V. LOWE, *supra*, at 265; IMO, *Surviving Disaster—The Titanic and SOLAS* (graphic of *Titanic* disaster and provisions of SOLAS that address safety issues related to the disaster), *available at* <http://www.imo.org/Safety/mainframe.asp?topic_id=479)>. SOLAS has been repeatedly updated since its enactment. Revised SOLAS Conventions were adopted in 1929, 1948,

1978, 1361 U.N.T.S. 190; Convention on Facilitation on International Maritime Traffic, Apr. 9, 1965, 18 U.S.T. 411; International Labor Organization, Convention Concerning Minimum Standards in Merchant Ships, No. 147, 15 I.L.M. 1288 (1976). The Bahamas is a party to each of these conventions.

[12] The Bahamas Merchant Shipping Act, which has been amended on numerous occasions since its enactment in 1976, governs virtually every aspect of shipping and navigation. The Bahamas' other principal laws regulating shipping include the Merchant Shipping (Oil Pollution) Act of 1976, the Merchant Shipping (Maritime Claims Limitation of Liability) Act of 1989, and the Bahamas Maritime Authority Act of 1995.

1960, and 1974. Since the 1974 SOLAS was adopted, it has been amended numerous times to keep pace with industry concerns with respect to cruise ships and other vessels—in 1978, 1981, 1983, 1988, 1989, 1990, 1991, 1992, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, and 2003. *See* SOLAS, *available at* <http://www.imo.org/ Conventions/ mainframe.asp?topic_id=257&doc_id=647>. Since 1960, the IMO has undertaken the primary responsibility for monitoring safety issues and proposing amendments, and the IMO meets regularly to consider such issues. The BMA regularly attends and participates in all committee meetings of the IMO and, as noted, holds a seat on the governing council of the IMO. In short, SOLAS is a comprehensive and responsive body of international law.

International law assigns flag states principal responsibility for enforcing these maritime design and safety standards. *See* R.R. CHURCHILL & A.V. LOWE, *supra*, at 273. Yet unlike the duty to promulgate those standards—which the flag states alone enjoy—international law recognizes that port states may play a role as well by inspecting, and where warranted, even detaining foreign-flagged ships that fail to meet international standards. *See* SOLAS, Ch. 1, Reg. 11. But, consistent with maritime law's concern for uniformity and predictability, those international standards are the *only* standards that the port state may apply during its inspection. Thus, even if the port state has adopted more rigorous requirements for its own ships, it may not hold foreign-flagged ships to that higher national standard.

A number of international conventions, including SOLAS and ILO Convention No. 147, 15 I.L.M. 1288 (1976), grant port states primary authority for inspecting and—where appropriate—detaining foreign-flagged ships that fail to meet certain minimum international design standards. *See id.* art. 4. Based on these conventions, a number of countries have formed regional pacts—in Europe, the Pacific, the Caribbean, and elsewhere—that coordinate port-state inspections. The

oldest and most established of these regional pacts—the Paris Memorandum of Understanding, 21 I.L.M. 1 (1982)—compiles an annual list ranking the overall safety of each flag state based on the number of ships from its registry that had been detained that year. The Bahamas has consistently been on the "White List," reserved for "flags with a consistently low detention record." Paris Memorandum of Understanding on Port State Control, Annual Report 2003 at 15, 27.

2. Applying Title III's accessibility rules to foreign-flagged ships would not only disrupt this carefully calibrated international framework, but also create a violent sea of potential clashes between United State law and the laws of other nations—and the community of nations. Ship design is a complex integrated process, demanding engineering expertise and enormous economic resources. A ship's design cannot change every time the ship tacks for a new port. One of the greatest virtues of international maritime law is that, by putting in place a system of bright-line rules that are promulgated by a single sovereign and backed by comity and reciprocity, ships need not overhaul their architecture each time a new country devises a new set of design standards.[13]

But if a leading maritime nation like the United States breaks from the established practice and unilaterally imposes its own structure and design standards on foreign-flagged ships, there is nothing to prevent every other flag state from taking similar steps. Indeed, such a unilateral action might prompt other nations to enact their own design codes either to *strengthen* or *alleviate* the specifications in the United States

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[13] As the IMO has observed in explaining the need for an international framework for developing safety and other maritime rules: "[S]hipping is an international industry. If each nation developed its own safety legislation the result would be a maze of differing, often conflicting national laws. One nation, for example, might insist on lifeboats being made of steel and another of glass-reinforced plastic." IMO, *Frequently Asked Questions*, *available at* <http://www.imo.org/home.asp>.

code. *Cf. McCulloch* U.S. Br. 27 (Application of United States labor law to foreign-flagged vessels "would have significant repercussions, and could lead to reprisals against American shipping by the flag countries involved."). That is one of the principal reasons this Court has historically respected the law of the flag. *See Lauritzen*, 345 U.S. at 582 ("we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided").

Such a scenario is not unrealistic and, if it ensued, "would raise considerable disturbance not only in the field of maritime law but in * * * international relations as well." *McCulloch*, 372 U.S. at 19. Some 40 nations—many of them major maritime powers[14]—have enacted disabilities-discrimination laws. At least three countries have already promulgated accessibility standards for ferries operating on their *own* registries.[15] If these and other countries were to respond to a decision by this Court extending Title III of the

[14] *See* Theresia Degener, *Disability as a Subject of International Human Rights Law and Comparative Discrimination Law*, *in* THE HUMAN RIGHTS OF PERSONS WITH INTELLECTUAL DISABILITIES: DIFFERENT BUT EQUAL 151, 167 (Stanley S. Herr et al. eds., 2003) (listing, among others, Australia, Canada, Germany, Korea, South Africa, Spain, Sweden, and the United Kingdom as having enacted antidiscrimination statutes regarding the disabled); Disability Rights Education & Defense Fund, *Country Laws Index*, <http://www.dredf.org/international/lawindex.html> (listing more than 40 countries with disabilities-rights laws).

[15] *See* United Kingdom, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People, *available at* <http://www.dptac.gov.uk/pubs/guideship/index.htm>; Canada, Code of Practice, Ferry Accessibility for Persons with Disabilities, *available at* <http:// www.cta-otc.gc.ca/access/codes/ferry/index_e.html>; Australia, Disability Standards for Accessible Public Transport, *available at* <http://law.gov.au/www/civiljusticehome.nsf/AllDocs/RWP2D7CECE1EA698DC4CA256C1D00001E0B?OpenDocument>.

ADA to foreign-flagged ships by extending their own disabilities laws to foreign ships, conflicts and confusion over the specifications governing the design and structure of passenger vessels could pervade international maritime commerce. Quite apart from major structural differences—such as the number of accessible elevators or cabins per floor—conflicting standards for basic design elements—such as the height of service counters, the circumference of hand railings, and the angle of coamings—would make international voyages virtually impossible. For example, the crew of a cruise ship with 200 hand rails would need to replace every one of those rails if the disability law in the next port of call specified rails a quarter inch thicker.[16]

The well-established international framework discussed above is designed to prevent such intolerable results. The international community may—as it has with many other design standards before—develop accessibility rules for cruise ships collectively through existing bodies like the IMO. Notably, the first steps in such an initiative have already been taken. In 1996, the IMO's Maritime Safety Committee—on which The Bahamas sits—issued a comprehensive set of guidelines "on the design and operation of passenger ships to respond to elderly and disabled persons' needs." IMO, Maritime Safety Comm., *Recommendation on the Design and Operation of Passenger Ships to Respond to Elderly and Disabled Persons' Needs*, MSC/Cir. 735 (June 24, 1996). Although not binding, the IMO's guidelines served as the basis for the accessibility rules that the United Kingdom recently established for

[16] It is possible to book a voyage on the *Queen Elizabeth 2* for a 46-day cruise from Singapore to New York that stops in at least 16 different countries. But even a simple transatlantic voyage from Southhampton to New York could run aground on regulation if the United States and Great Britain each adopted and imposed a different set of structural and design requirements on the *Queen Elizabeth* and other vessels that call on their ports.

ferries. *See* United Kingdom, Design of Large Passenger Ships and Passenger Infrastructure: Guidance on Meeting the Needs of Disabled People, *supra*, at 3.

The IMO—"[t]he organization that has probably had the most substantial direct effect upon the law of the sea," R.R. CHURCHILL & A.V. LOWE, *supra*, at 23—provides an ideal forum for addressing this issue in a multilateral fashion. The Bahamas participated in the discussion of the IMO's guidelines on access for the elderly and people with disabilities, is monitoring the developments in other nations, and stands ready to assist in an international response.

3. Applying Title III to foreign-flagged ships also runs the grave risk that ship owners will be forced to reconcile SOLAS obligations with accessibility standards issued by the Department of Transportation. As the Department of Justice acknowledged shortly after the ADA was enacted, "[b]ecause of the unique structure of ships, *none* of the [ADA Accessibility Guidelines for Buildings and Facilities] technical or scooping standards are appropriate." U.S. DEP'T OF JUSTICE, ADA TECHNICAL ASSISTANCE MANUAL § III-5.3000, illus. 3 (1993) (emphasis added). Indeed, in its Final Report, the Passenger Vessel Access Advisory Committee (PVAAC) identified 98 specific conflicts between ADAAG and the Coast Guard's regulations implementing SOLAS. *See* Recommendations for Accessibility Guidelines for Passenger Vessels: Final Report (Dec. 2000) (ADAAG/Coast Guard Comparison Index), *available at* <http://www.access-board.gov/pvaac/ commrept/index.htm>. And, as the Court of Appeals noted below, even after years of studying how to apply traditional accessibility standards to ships, the PVAAC was still identifying conflicts between SOLAS and proposed guidelines. *See* Pet. App. 9a n.6.

Petitioners and their amici try to downplay the prospect of such conflicts by arguing that, at least in their view and the view of the PVAAC, "the newer draft guidelines recently released by the Access Board" resolved the final conflicts.

Pet. Br. 45. But those guidelines—released more than a decade after the ADA was enacted and just days before the filing of the government's amicus brief in this case—are only in draft form, and were issued for comment. No one knows what will result from this project, much less when that process will be completed. In any event, in the end, both petitioners and the United States concede that Title III's accessibility rules—either those just proposed or others in the pipeline—might conflict with SOLAS. Their solution, however, only underscores the problem of applying domestic design standards to foreign-flagged ships in the first place. According to petitioners, the answer to any conflicts between Title III and international law governing ships should be left to "expert [U.S.] government regulators." Pet. Br. 45.

Both petitioners and the United States concede that "to the extent that removal of an architectural barrier would conflict with an existing treaty provision, such removal would not be considered 'readily achievable' within the meaning of Title III." U.S. Br. 27; Pet. Br. 42. The problem is that ship owners may not know whether a particular accessibility rule conflicts with SOLAS—and is therefore not "readily achievable"—until after a lengthy and expensive adjudication. Moreover, even if a vessel owner—perhaps after having paid for the services of an American lawyer specializing in ADA law—makes a good faith determination that a regulation is not "readily achievable" on his vessel, he will still face the prospect of an ADA action the moment the ship enters United States waters. The uncertainty and cost created by such a regime will have a destabilizing and highly disruptive effect on international maritime commerce.

4. It is not only the prospect of clashes between Title III and international law that will create international discord and confusion for foreign-flagged vessels. Currently, vessel owners and regulators are guided by a clear set of design and safety standards: those established by the flag state and international conventions that the flag state has adopted. If

Title III were extended to foreign-flagged cruise ships, then the owners of such vessels and flag states would be responsible for deciphering a new code. It has taken the Department of Justice more than a decade just to issue *draft* guidelines on how Title III would apply to passenger vessels. It could take years more for the government to issue final rules. Before such rules are promulgated, United States courts presumably would be required to develop structure and design requirements on an ad hoc, case-by-case basis. Moreover, even when final rules are issued, foreign-flagged vessels would have to continuously monitor how they are interpreted and applied by the hundreds of federal judges that have jurisdiction over ADA actions. Those judges are likely to lack expertise in the technicalities of maritime architecture and design. And, inevitably, United States courts will reach conflicting rulings on the application of Title III to such vessels. It would be difficult to devise a more disruptive and chaotic regulatory regime for this "delicate field of international relations." *McCulloch*, 372 U.S. at 21.[17]

[17] The United States suggests that the way out of this international conundrum is to hold that Title III applies "to foreign-flagged cruise ships, *except to the extent that enforcing ADA requirements would conflict with a treaty.*" U.S. Br. 12; *see id.* at 27. That argument fails. First, it would transform the clear-statement rule applied in this sensitive context into a narrow—and arguably superfluous—conflicts rule. Second, it would not address the enormous uncertainty that would exist over when such a conflict exists in the first place. And third, it fails to account for the fact that—quite apart from any specific conflict between Title III and a treaty—extending Title III to foreign-flagged vessels would interfere with the active international framework and body of customary international law (not limited to treaties ratified by the United States) governing vessel design and safety.

F. The Wrongful Nature Of Discrimination Does Not Sustain The Conclusion That Congress Intended To Apply Title III To Foreign-Flagged Vessels

Relying on *Wildenhus's case* and *Uravic* v. *F. Jarka Co.*, 282 U.S. 234 (1931), the United States argues that Title III applies to foreign-flagged ships because "Title III prohibits discrimination 'of a nature to disturb the public peace' and 'of a character to affect those on shore or in port when it becomes known.'" U.S. Br. 24 (quoting *Wildenhus's case*, 120 U.S. at 17). That argument is unavailing.

Both *Wildenhus's case* and *Uravic* recognize the authority of the port state to regulate a foreign vessel that reaches its ports. They do not trump the settled canon that Congress does not intend to exercise such authority unless it clearly says so. Moreover, *Wildenhus's case* and *Uravic* have been limited to the special contexts in which they arose. *Wildenhus's case* involved a major crime—murder—aboard a foreign vessel in American waters. *Uravic* involved a maritime tort covered by the Jones Act, 46 U.S.C. § 688, which has roots in the "general maritime principles of compensation for personal injury." *Romero*, 358 U.S. at 382. Neither case supports the conclusion that Title III—which neither governs major crimes nor has roots in maritime law—automatically applies to foreign-flagged vessels.

To the contrary, in *Wildenhus's case*, the Court recognized that the flag state has an overriding interest in the regulation of the internal affairs of its ships. *See* 120 U.S. at 12. There is scarcely any matter more closely connected to the internal order of a vessel—or of greater interest to the "authorities of the nation to which it belong[s]," *id.*—than the requirements relating to the vessel's structure and design. Similarly, there is little that a port state could do that would prove more disruptive to maritime commerce than to impose its own structural or design requirements on the ships that enter its waters. That disruption is the same regardless of whether the

port state is trying to prevent discrimination aboard the ship or to ensure the safety of passengers in stormy seas.

A broader reading of *Wildenhus's case* would unduly interfere with the law of nations giving primary importance to the law of the flag. In a generalized sense, any form of discrimination represents an affront to "public peace" and "dignity." But so too, it invariably will be possible to argue that the violation of a public law affects the "public peace" and "dignity." Indeed, that is certainly true with respect to labor laws designed to prevent disruptions like picketing and boycotts. *Cf. Benz*, *supra*. Yet this Court has never subjected the jurisdictional determination of whether United States law displaces the law of the flag state with respect to the regulation of internal affairs to such an indeterminate and value-laden "public peace" and "dignity" inquiry.

Instead, this Court has adopted a clear and predictable rule to govern this crucial jurisdictional determination: in order to "sanction the exercise of local sovereignty * * * in this 'delicate field of international relations there must be present the affirmative intention of Congress clearly expressed.'" *McCulloch*, 372 U.S. at 21-22 (quoting *Benz*, 353 U.S. at 147). Title III lacks such an "affirmative intention."

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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THE BAHAMAS

FLAG STATE PERFORMANCE SELF-ASSESSMENT FORM

For the purposes of IMO Assembly Resolution A.881(21)

GENERAL

1. Name of State **THE BAHAMAS**, *The Commonwealth of*

2. Name of Contact Person responsible for completion of this form

Director

Name of Administration

Bahamas Maritime Authority

Address

2nd Floor
Latham House
16 Minories
LONDON
EC3N 1EH
United Kingdom

Telephone Number

+44-20-7264-2550

Fax Number

+44-20-7264-2579

E-mail address

tech@bahamasmaritime.com

3. Indicate to which of the following international instruments your State is a Party and which (optional) MARPOL 73/78 Annexes have been ratified.

SOLAS 74	Yes
SOLAS Protocol 78	Yes
SOLAS Protocol 88	Yes
MARPOL 73/78	Yes
Annex III	Yes
Annex IV	No
Annex V	Yes
Annex VI	No
LL 66	Yes
LL Protocol 88	Yes
TONNAGE 69	Yes
COLREGS 72	Yes
UNCLOS	Yes

4.1	How many merchant ships of 100 gross tonnage and upwards, subject to the relevant instruments you indicated in question 3, are currently flying the flag of your State?	1,376
4.2	What is the gross tonnage of merchant ships flying the flag of your State?	29.2 million

INTERNAL CRITERIA

Legal Framework

5.	Does your Administration have the necessary laws in force to implement international maritime safety and pollution prevention instruments with regard to:	
	.1 the construction, equipment and management of ships;	Yes
	.2 the prevention, reduction and control of pollution of the marine environment;	Yes
	.3 the safe loading of ships;	Yes

	.4 the manning of ships;	Yes
	.5 the safety of navigation (including taking part in mandatory reporting and routing systems), maintenance of communications and prevention of collisions	Yes
6.	Does your Administration have the necessary laws in force to ensure the provision of penalties of adequate severity to discourage violation of international instruments to which your State is a Party?	Yes
7.	Does you Administration have the necessary laws in force to provide for ship inspections to ensure compliance with international maritime safety and pollution prevention standards, to which your State is a Party?	Yes
8.	Does you [sic] Administration have the necessary laws in force to take legal action against ships which have been identified as not being in compliance with the international instruments to which your State is a party?	Yes
9.	Does your Administration have the necessary laws in force to carry out the required casualty investigations?	Yes

Enforcement

10.	Does your Administration have an infrastructure, including personnel with appropriate technical expertise and experience, to:	

.1 identify ships flying the flag of your State which are not in compliance with international maritime safety and pollution prevention requirements? Yes

.2 take action against ships flying the flag of your State which have been identified as not being in compliance with international maritime safety and pollution prevention requirements? Yes

-If yes, against how many such ships was action taken for each of the previous 5 years*

Appropriate action is taken in every incidence in which a Bahamian ship is found not to comply with international convention safety and pollution prevention requirements.

11. Did your Administration investigate detentions by port States of ships flying the flag of your State for each of the previous 5 years*? (see also question 28) Yes

-If yes, indicate how many such detentions were investigated. All

Recognised organisations acting on behalf of your Administration

12. Which organisations has your Administration recognised for the purpose of delegation of authority under the relevant instruments you indicated under question 3?

American Bureau of Shipping (ABS)
Bureau Veritas (BV)
Det Norske Veritas (DNV)
Germanischer Lloyd (GL)
Korean Register of Shipping (KRS)
Lloyd's Register of Shipping
Nippon Kaiji Kyokai (Class NK/ NKK)
Registro Italiano Navale (RINA)

13. When your Administration delegates authority to recognised organisations, does it follow resolutions A.739(18) and A.789(19) as minimum requirements, the requirements in SOLAS 74, regulation XI/1, and the analogous requirements in MARPOL 73/78? Yes

14. Has your Administration provided IMO with a copy of the formal agreement or equivalent legal arrangements with the recognised organisations listed in question 12? Yes

15. Indicate which survey and/or certification functions your Administration has delegated to the recognised organisations referred to in question 12.

Statutory surveys and certifications in respect of

- SOLAS 74/88
- Load Lines Convention 66/88
- Tonnage Convention 69
- Marpol 73/78

Plan Approval in respect of COLREG 72

Approval of documentary aspects/ assessment of arrangements for on-board training under STCW 1978

Type approval of containers under SAFE CONTAINERS 1972

Certification and compliance documentation under various IMO codes

Verification of compliance with Code of Safety for Caribbean Cargo Ships

16. Indicate, for the instruments you listed under question 3, which survey and/or certification functions are carried out by your Administration. — None

17. Does you [sic] Administration carry out the verification and monitoring functions specified in resolution A.739 (18) ? — Yes

18. How does your Administration carry out the verification and monitoring functions specified in A.739 (18) ?
    - verbal and written communication with Organisations
    - Organisations are required to make reports to the Administration
    - vessels are required to complete at least one annual inspection survey performed by the Administration's inspectors
    - all authorised Organisations have quality systems certified to ISO 9001 or equivalent standard and also to IACS standard.

19. How often does your Administration verify and monitor the work of recognised organisations acting on its behalf? — Every 1 month(s)

20. How does your Administration take specific responsibility for international certificates issued on its behalf by dependent territories/ second registers? — n/a

    The Bahamas has only one register and no dependent territories.

21. Does your Administration have the means (financial and administrative) to ensure that thorough and prompt casualty and incident investigations into all cases of serious and very serious casualties, as defined in paragraph 4.2 and 4.3 of the Annex to resolution A.849(20), are carried out? — Yes

22. For each of the previous 5 years*, for ships flying the flag of your State:

.1 How many serious and very serious casualties and incidents were investigated?

1999	1998	1997	1996	1995
15	12	12	7	9

.2 How many such casualties and incidents were reported to IMO? All

23. Can your Administration provide to IMO, on request, evidence which shows that casualties and incidents on ships flying the flag of your State have been investigated? Yes

24. For each of the previous 5 years*, has your Administration provided IMO with the mandatory annual reporting required by article 11.1(f) of MARPOL 73/78? Yes

25. How many allegations of violations, according to article 4 of MARPOL 73/78, have been made against ships flying the flag of your State in each of the previous 5 years*?

1999	1998	1997	1996	1995
6	1	10	16	8

.1 How many investigations or legal proceedings has your Administration carried out in the previous 5 years* in accordance with articles 4 and 6 of MARPOL?

1999	1998	1997	1996	1995
6	1	10	16	8

.2 In how many cases did you [sic] Administration report back to the reporting State or to IMO in each of the previous 5 yrs* ?

1999	1998	1997	1996	1995
6	1	10	16	8

EXTERNAL CRITERIA

26. For each of the previous 5 years*, how many ships flying the flag of your State:

.1 have been involved in serious or very serious casualties?

1999	1998	1997	1996	1995
15	12	12	7	9

.2 have become total losses or constructive total losses?

1999	1998	1997	1996	1995
2	6	4	2	2

.3 have caused severe pollution**?

1999	1998	1997	1996	1995
0	0	1	0	0

.4 What casualty rate per 1000 ships does this represent?

1999	1998	1997	1996	1995
10	7	8	5	6

.5 What is the total tonnage involved as a percentage of the total fleet?

1999	1998	1997	1996	1995
0.14%	0.19%	0.06%	0.06%	0.06%

27. In each of the previous 5 years*, how many lives have been lost:

.1 in casualties involving ships flying the flag of your State?

1999	1998	1997	1996	1995
1	2	5	9	4

.2 due to occupational accidents (i.e. other than from casualties to ships) on ships flying the flag of your State?

1999	1998	1997	1996	1995
5	6	9	7	4

NB — Includes: falls; boarding or disembarking; accidents on deck and in machinery spaces; deaths in enclosed spaces; but does not include: accidents ashore; homicide; suicide; or deaths form [disease or natural causes.

28. .1 For each of the previous 5 years*, how many ships flying the flag of your State were detained, within the scope of SOLAS 74, MARPOL 73/78, LL 66 or COLREGS 72, by port States? 91/year (average)

.2 What detention rate per 1000 ship inspections does this represent? (see also question 11) 34 per 1000 ships/ year

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* or from the date your Government became a Party to the relevant instrument, if that is later.

** "Severe pollution" is a case of pollution which, as evaluated by the coastal State(s) affected of the flag State, as appropriate, produces a major deleterious effect upon the environment, or which would have produced such an effect without preventive action.

GUIDELINES FOR BMA APPROVED INSPECTORS

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1.0 Introduction and General Information

1.1 Introduction

These guidelines address the framework within which Inspectors will normally be required to operate. The purpose of this document is to consolidate BMA information, policy, and existing practices into a single document offering guidance to Inspectors. It is intended that this document will enable world-wide standards and procedures of all BMA Inspections to be carried out and reported with uniformity.

1.2 Definitions

For the purpose of these Guidelines the definitions given hereunder apply.

- BMA: The Bahamas Maritime Authority.
- Vessel: Any Bahamian registered vessel.
- Candidate vessel: Any non-Bahamian registered vessel intended for The Bahamian Register.
- Inspector: An Approved Nautical Inspector who, as an employee of the Inspection Company, has been duly authorised

by the BMA to act on its behalf in accordance with the terms of the "Agreement".

- Agreement: The terms agreed between the BMA and the Inspection Company under which the Inspection Company, will undertake Inspection services on behalf of the BMA.
- Inspection Company: A signatory to the Agreement and employer of the Inspector.
- Inspection: A Pre-Registration Inspection or Initial Inspection or Annual Inspection.
- Port State Control (PSC): A Coastal Authority authorised , under a Regional Memorandum of Understanding in conjunction with the International Maritime Organisation (IMO), to inspect any vessel operating in its national waters.
- Port State Detention: The situation where a vessel has been detained by PSC.
- Anniversary date: The date on which the vessel was first inspected by the BMA, regardless of the date on which the Inspection Certificate was issued.
- Inspection Certificate: A certificate issued to a vessel signifying that it has undergone a satisfactory Bahamas Inspection.
- Authorised Classification Societies: Eight Classification Societies authorised to act on behalf of the BMA namely:-

  Lloyds Register of Shipping
  Det Norske Veritas Korean register of Shipping
  Bureau Veritas
  Germanischer Lloyd
  American Bureau of Shipping
  Nippon Kaiji Kyokai
  Registro Italiano Navale
  Korean Register of Shipping

1.3 BMA Mission Statement

The BMA is committed to maintaining high standards of safety and environmental protection and to implement and uphold international Convention standards for the vessels under its administration and to enforce such standards fairly.

1.4 Purpose of the Inspectorate

The BMA appoints Inspectors to assist it in fulfilling its function as a responsible Flag State Administration. The purpose of making these appointments is to facilitate the inspection of or attendance on board any vessel or any candidate vessel in a timely and cost-effective manner anywhere in the world. Inspection will normally be in connection with assessing the vessels condition, onboard safety standards and technical and operational integrity; other attendance will normally be in connection with registration requirements, to carry out a casualty investigation or to represent the BMA at a Port State detention.

1.5 Quality of Inspections

It is intended that the quality of inspections should follow best industry practice. In most parts of the world there is now a coordinated approach to PSC through regional Memoranda of Understanding, this means that most ships will now undergo at least one PSC inspection during the course of any year. BMA Inspections shall endeavour to minimise the risk to a vessel of being detained following a Port State Inspection. This is not only to uphold the standards of the BMA but also to provide Owners with confidence that their vessels will pass any PSC Inspection, also that the work performed by the Classification Society is of an acceptable standard.

2.0 The Role of a Bahamas Inspector

2.1 General Role

An Inspector acting on behalf of the BMA may be required to carry out 6 tasks:

i. To conduct pre-registration inspections on candidate vessels of 12 years or older.
ii. To conduct initial inspections on vessels of under 12 years of age.
iii. To conduct annual inspections on all vessels.
iv. To attend and render general assistance on vessels detained by PSC.
v. To conduct other tasks as required by the BMA in connection with:- vessel registration; carving & marking; endorsement of certificates; verifying the existence of an Inspection Certificate etc.
vi. To conduct accident investigations.

All of the above should be conducted either in accordance with standing instructions in these notes, or special instructions issued by the BMA for a particular case. Items 2.1.i, ii & iii are normally carried out at the request of the owner as required by the BMA, whereas instructions to carry out 2.1.iv, v & vi will normally be given by the BMA.

When undertaking annual inspections, Inspectors are required to monitor the work of the Classification Societies. Therefore, an Inspector must never assume that simply because a Classification Society Surveyor has carried out an onboard survey, that a BMA Inspection is not required. When a Classification Society Surveyor is onboard a vessel at the same time as a BMA Inspector, it is preferable that that their respective tasks are carried out independently of one another.

Any Inspector undertaking work on behalf of the BMA is obliged to be knowledgeable about the type of vessel to be inspected, relevant Codes and International Conventions, the standards that should be attained by Classification Societies and with the general standards demanded by Port State Control. In order to promote high standards generally, all Inspectors must have the necessary professional qualifications, experience and competence as set out in the Agreement.

2.2 Powers of an Inspector

An Inspector is entitled to board any vessel at any reasonable time provided he can produce proper identification. Normally an Inspector should only board a vessel when he has been requested to do so either by the owner to carry out a specific inspection, or by the BMA.

When given specific written instructions by the BMA, an Inspector shall remove from a ship the Registration Certificate or any other Statutory Certificate.

3.0 Inspections

3.1 Inspection Policy

Vessels under 12 years of age, are required to undergo an Initial Inspection following provisional registration, and before permanent registration is awarded.

Candidate vessels over 12 years old (and under 20 years) require a Pre-Registration Inspection before permanent registration is awarded.

Candidate vessels over 20 years of age will not normally be granted Bahamas Registration. If, in exceptional circumstances, due to its type, history and condition, it is decided to consider a candidate vessel over 20 years of age, then it will be required to undergo a documentation review in London Office. Normally, if the documentation review is successful it will be followed by a Pre-Registration Inspection and upon satisfactory completion the vessel may be offered provisional registration.

In such cases, a Pre-Registration Inspection would not normally be initiated before the outcome of the documentation review is known.

Registered vessels are required to undergo an Annual Inspection on or around their anniversary date.

The intent and scope of Inspections is set out in section 3.3.

The following ships are exempt from the inspection provisions of these Guidelines:

i. Ships solely engaged in fishing
ii. Pleasure yachts
iii. Ships registered under: The Bahamas Port Authority Act, The Bahamas Boat Registration Act and The Bahamas Water-Skiing and Motor Boat Control Act.

3.2 Aims and Process of Inspections

The following aims and processes apply to all categories of Inspections;

3.2.1 Aims

i. To ensure that all vessels and candidate vessels comply with international Convention standards;
ii. To verify that safety management, vessel operation, maintenance and mechanical condition are being upheld in accordance with good industry practice;
iii. To monitor the standard of work carried out by the vessel's Classification Society in executing its obligations to carry out statutory surveys;
iv. To ensure that vessel standards meet the inspection requirements of any PSC.

3.2.2 Process

i. To check the validity of all statutory certificates, documents, publications, Class survey status reports, and ISM documentation;
ii. To consult with the Master and Chief Engineer (and any other personnel with whom consultation may be deemed beneficial) in order to be reasonably satisfied that they possess knowledge and experience relevant to their positions on board the vessel;

iii. To perform a physical inspection of the vessel in order to ascertain its overall condition, maintenance standards, operational integrity and onboard safety standards;
iv. To witness emergency drills and functional checks on safety critical machinery and equipment;
v. Before leaving the vessel to de-brief the Master and Chief Engineer and provide them with a signed written summary of deficiencies and/or significant observations;
vi. On completion of a satisfactory inspection, to issue a Certificate of Inspection to the Master. In the event that the inspection proves unsatisfactory an alternative course of action may be considered necessary (see section 3.3.5).
vii. Following departure from the vessel, to notify London Office by telephone or fax of any concerns and promptly prepare and dispatch a detailed report, including a comprehensive set of photographs.

3.3 Inspection Category

Three categories of inspection (see section 2.1.i.ii.iii) are discussed below. The format and scope of each category of inspection will be in accordance with the Inspection Report and guidance therein. The Inspection report along with guidance on the required scope of inspections is discussed in Appendix A.

3.3.1 Pre-Registration Inspection

The purpose of a pre-registration inspection (for candidate vessels over 12 years of age) is to assist the BMA in reviewing an Owner's application to join the Register; the primary aim of the inspection is to assess the physical condition and safety standards of a candidate vessel. Whilst an assessment of the vessel's operational integrity is also required, occasionally a pre-registration inspection will be undertaken before a vessel changes ownership and it will not be possible to fully assess certification, publications, manning and procedural / policy aspects of the vessel. Inspectors should do their utmost to complete a

substantial part of the Inspect Report, leaving the reader in no doubt as to the vessel's physical condition and the standard of safety construction, safety equipment and pollution prevention onboard the vessel.

If a candidate vessel is not undergoing a change of ownership before registration then the format of the Inspection will follow the full scope of the Inspection Report. It is intended that the inspection will be rigorous, however the level at which the inspection is carried out will be determined by the Inspector's professional judgement, based on his general observations and instinctive impression of the vessel. However, where older or apparently poorly maintained vessels are concerned then extensive coverage of all sections of the Inspection Report will be mandatory.

Inspection items which require verification after a change of ownership has taken place should be clearly highlighted in the Inspection Report.

Note that the candidate vessel being inspected will not be in possession of Bahamas Statutory Documentation and Carving & Marking Note; moreover it may not be Classed by one of the Authorised Classification Societies. These items will need to be re-inspected on a separate occasion and this requirement should be clearly highlighted in the pre-registration inspection report.

3.3.2 Completing the Pre-Registration Inspection Process

The completed report form, including recommendations and corrective actions should be forwarded promptly to London Office, together with photographs of the candidate vessel. In order to accelerate the report review process, inspectors are requested to fax (or e-mail) a copy of the report in advance of the mailed report.

3.3.3 Initial Inspection

The initial inspection shall be carried out within six months of a vessel being awarded provisional registration.

The purpose of the Initial Inspection (for vessels under 12 years holding provisional registration) is to confirm that a vessel satisfies the physical and safety standards required by the BMA and in addition can pass a thorough examination of documentation, operational and manning requirements.

Vessels under initial inspection must be Classed with one of the Authorised Classification Societies and be in possession of Statutory Certificates issued on behalf of the Bahamas.

Upon satisfactory completion of an Initial Inspection a vessel will normally be awarded permanent registration status.

The scope and reporting requirements for initial Inspections will be as described for pre-registration Inspections, also the extent to which inspectors will wish to carry out a detailed examination of the vessel will be determined by their professional judgement, based particularly on the vessel's age and initial indications.

3.3.4 Annual Inspection

Annual Inspections are required for permanently registered vessels. Inspections fall due on a vessel's anniversary date (the date upon which either the Pre-Registration inspection or the Initial Inspection were held) and may [sic] carried out within a 3 month period before or after the anniversary date. This is to allow the Owner some flexibility to have an inspection when it is operationally convenient.

Regardless of when the Inspection is actually undertaken, the date on which the next inspection falls due will remain fixed at 12 months after the anniversary date.

The objective of the Inspection is the ongoing verification of a vessel's, standard of maintenance and operational safety and its compliance with international Convention standards, to monitor the effectiveness of the Classification Society in carrying out statutory work on behalf of the BMA and to monitor the vessel's overall status in relation to PSC requirements.

The Inspection should provide both the BMA and the Owner with a comprehensive impression of the vessel according to the above criteria and to identify any shortcomings or deficiencies requiring corrective action.

Whilst the scope of the inspection will follow that set out in the inspection report, the required level of detailed examination will normally depend on the vessel type, age, history and importantly the Inspector's professional judgement. Inspectors shall nevertheless be particularly cognisant of vessels of 12 years of age or older.

The standard of the Inspection should be such as to verify compliance with applicable rules and regulations so as to minimise any likelihood of the vessel becoming the subject of a PSC detention. It is impracticable to define a sub-standard ship solely by reference to a list of qualifying defects. An Inspector should use his professional judgement to determine whether a vessel is at risk; whether to make a recommendation to stop the vessel going to sea until the deficiencies are corrected or whether to allow it to sail with deficiencies that are not vital to the safety of the ship, its crew or passengers, having due regard to the particular circumstances of the intended voyage.

3.3.5 Completing the Initial and Annual Inspection Processes

On completion of both the Initial and the Annual Inspection it will be necessary for the Inspector to decide which of the following two categories applies to the vessel and hence what action to take before leaving the vessel:-

(a) No serious deficiencies reported: - The vessel is considered satisfactory and the Inspector may issue an Inspection Certificate to the Master together with a written summary of any observations or minor corrective actions required. When an Inspection Certificate is issued its expiry date should equate to the vessel's inspection anniversary date and not necessarily to a full 12 month period. The inspection anniversary date may be obtained from London office. It is

not permissible to issue a conditional or short term Inspection Certificate under any circumstances;

(b) Deficiencies reported: In the event of an unsatisfactory inspection then Inspectors should decide on one (1) of the following three options:-

(i) It is possible to correct the deficiencies before the vessel sails: The Inspector should offer to return to the ship to sign off corrective actions and if satisfied to issue an Inspection Certificate to the vessel (see 3.3.5 (a));

(ii) It is not possible for the vessel to correct the deficiencies before sailing: Provided that the deficiencies do not constitute a serious risk to the safety of the vessel and its personnel, the vessel may be allowed to sail. An Inspection Certificate should not be issued. The Master should be informed in writing (using the form **SAFESUM**) that another inspection has to be carried out at the vessel's next port of call. Inspectors should promptly advise London office by fax, copying the Vessel's Managers.

Note: Situations may arise where the corrective action would require input by the BMA eg. issuance of a safe manning certificate or Bahamian officer's licences. Such situations would not normally require another inspection. The Master should be instructed to follow up the required action; if no other corrective action is required then an Inspection Certificate should be issued.

(iii) The deficiencies are such that in the opinion of the Inspector the vessel should not be allowed to sail in its present condition: Under no circumstances should a Safety Certificate be issued. Inspectors should immediately consult with London Office who may authorise the Inspector to remove Certificates from the vessel and effectively detain it until repairs have been carried out and the vessel re-inspected.

4.0 Attending Vessels under PSC Detention

4.1 General

A detained vessel reflects badly on The Bahamas Maritime Authority.

Every detention requires follow-up action. It is mandatory that any action taken by the BMA shall be reported to the detaining state, to IMO and to the Classification Society (if it has been party to the detention).

If a detention is notified to the BMA whilst the ship is still under detention, then it may be necessary for an Inspector to attend the vessel during the detention. In such situations attendance by an Inspector shall only be undertaken on the instruction of London Office.

An inspector attending a PSC detention should try to ascertain whether the reported deficiencies should have been highlighted by recent Class surveys or Bahamas Inspections.

4.2 Actions to be taken by the Inspector

The following procedure should be adopted by Inspectors attending a detained vessel.

4.2.1 Vessel detained

An attending Inspector will receive instructions from London office in connection with the vessel's circumstances and the information that he will be required to report. BMA London Office will notify the vessel's Owner and arrange for the Inspector to attend the vessel. BMA London Office will also liase directly with Classification Society and ISM issuing authority (if applicable and if a different organisation from Class) in connection with the PSC detention.

The inspector should report to London office by telephone once a preliminary assessment of the situation has been made. A joint decision regarding further action will be taken at the time.

Although in general the Inspector should try to facilitate the vessel's release from detention, under no circumstances should he be party to its departure until all necessary corrective actions have been carried out.

If either the Owner or Master show any inclination to omit any necessary work or to leave before everything is in order, the inspector should seek authorisation to remove the vessel's Statutory Certificates and Certificate of Registry.

On completion of the above tasks a written report should be submitted to London office.

4.2.2 Vessel released

Circumstances permitting, it is recommended that if in doubt about the vessel's integrity then an inspection should be carried out to the level of an Annual Inspection. This will have the dual effect of conveying the actual condition of the vessel to Owners and to the BMA and recommending corrective action of any deficiencies that the Inspector feels would be in the Owner's interest in order to avoid further risk of detention by other PSC Authorities.

If the detention appears to be unjustified, then London office should be informed in order that an appeal may be lodged with PSC.

5.0 Other tasks for Inspectors

5.1 Registration

From time to time Inspectors may be required to carry out ancillary tasks in connection with the vessel registration:

5.1.1 Stamping and Signing of Carving and Marking Notes

Carving and Marking Notes are issued to Owners by the BMA Registrar. During his attendance onboard the vessel, the Inspector is required to witness both the internal and external Carvings and Markings and to endorse the Note accordingly. Inspectors should

immediately fax a copy of the endorsed Carving and Marking Note to the Registrar, with the original to follow by mail.

Where a Carving and Marking is to be witnessed then it should be understood that the BMA requires that the vessel's name and port of registry marked on the outer hull shall be marked conspicuously and permanently, ie. not simply painted over the old marks; weld beading or equivalent should be employed.

Where, for justifiable reason, e.g. hot-work requires a tanker to be gas freed, an Owner/Master feels that this requirement cannot be met, the BMA should be notified stating reasons and advising a date and place where it is intended to implement permanent changes to hull markings. The BMA may then authorise painted marks to be accepted as temporary markings. Inspectors are not authorised to accept such temporary marks without approval.

Similarly the vessel's official number and registered tonnage should be permanently marked inboard in a conspicuous position. A dispensation from this requirement will only be permitted through consultation with London office.

5.1.2 Endorsement of Registration Documents

Typical Registration Documents that routinely require to be endorsed onboard a vessel by an Inspector are; Registration Certificate, Safe Manning Certificate, Safety Radio Certificate. Any endorsement of a vessel's Registration Document is to be undertaken by an Inspector only upon receipt of written authorisation by the Registrar or person deputising for the Registrar.

5.1.2.1 Vessel Name or Tonnage

Upon instructions from the Registrar, Registration Documents may require to be endorsed with a change of vessel name or tonnage in accordance with the completed Carving and Marking Note. Copies of endorsed documents should be immediately faxed to the Registrar. The original documents should be retained onboard.

5.1.2.2 Owner's Name and Address

Upon instructions from the Registrar, Inspectors may be required to endorse Registration Documents with a change of Owner's name and address. Copies of endorsed documents should be faxed to the Registrar, original documents should be retained onboard.

5.2 Verification of existence of a valid Inspection Certificate

i. Vessel Inspection dates are communicated to vessel owners by the BMA and owners are thereafter [sic] it is an owners responsibility to arrange for a timely inspection of the vessel to be carried out. If a vessel's Annual Inspection appears not to have been carried out within 15 months from the vessel's anniversary date, then an Inspector may be called upon to attend a vessel in order to ascertain whether the vessel has been inspected or not. This situation may have arisen due to an oversight by the previous Inspector in not submitting an inspection report, or because the Owner has neglected to arrange for an inspection to take place.

   The BMA will normally notify the vessel's owner in advance that an Inspector will be attending the vessel and the reason for his attendance.

   When the Inspector goes onboard, he should explain the purpose of the visit to the Master and ask to sight a copy of the latest Annual Inspection Report and Safety Certificate.

ii. If a valid Inspection Report and Safety Certificate are available, then the Inspector should note the name of the Inspector who performed the inspection, the port at which it was carried out and the date of Inspection. The visit can then be concluded.

iii. If a valid Inspection Report and Inspection Certificate are unavailable, then a request should be made to sight all of the vessel's certificates (see the SAFECERT section of the Inspection

Report Form) including the vessel's Registration Certificate, Class and Statutory Certificates: -

- The Inspector should inform the Master that the vessel requires an immediate Annual Inspection and obtain his agreement for the inspection to be undertaken forthwith. At the same time, Inspectors should report the situation to the London office and be guided accordingly.
- If any of the vessel's Statutory Certificates are found to be invalid the Master should be instructed to have the necessary surveys carried out by Class prior to sailing and verified by the Inspector. If the Master is unable to comply with this request, then the London office should be consulted immediately.

6.0 Accident Investigation

6.1 General

When an Inspector is requested to carry out an accident investigation he should follow the Guidelines in Appendix B, in addition separate instructions will be issued dealing with the specific requirements of the case in question.

7.0 Appendices

Appendix A - Inspection Report

General

The following notes, to be read in conjunction with Section 3.0 of the Guidelines, are intended to assist Inspectors in carrying out inspections and presenting a report and comments in a standard structured format. The Inspection Report Form has been compiled as a stand-alone document.

All Inspections will follow the format set out in the Inspection Report Form. The Report Form comprises the following sections:

SAFEDAT - general vessel information

SAFESUM - summary of findings, 1 copy to be left onboard
SAFECERT - standard certificate questionnaire
SAFENAV - navigation equipment
SAFECREW - crew management
SAFEDECK - hull, decks and fittings
SAFEQUIP - lifesaving apparatus & fire fighting equipment
SAFENG - machinery spaces
SAFEPASS - passenger ship supplement
SAFETANK - tanker, chemical & gas carrier supplement

During the limited time available onboard it will not be possible to inspect every item closely, nor should it be necessary to do so. For Initial and Annual Inspections, a preliminary cursory look around the vessel will indicate whether the vessel is being operated and maintained correctly. Assuming positive indications, then the physical inspection procedure should be a sampling process rather than a detailed item by item examination. A more rigorous approach, particularly with regard to physical condition, will be required for Pre-registration Inspections.

Inspectors shall apply standards to inspection and reporting that are consistent with the stated aims and objectives of the BMA (Section 3.2.1). On completion of the inspection, the Inspector should summarise, on form SAFESUM, any deficiencies or observations arising and issue a copy to the Master before leaving the vessel.

Inspection Reports should be completed in triplicate by the Nautical Inspector, the original should be forwarded to London Office, with one copy being forwarded to Owners (except with pre-registration inspections where Owner's may request a copy from London Office) and the remaining copy being retained by the Inspector. Photographs should be included as part of Pre-registration and Initial Inspections, but need not be included with Annual Inspection Reports.

The Inspection Report Form has been formatted to enable it to be compiled electronically. It is expected that both Inspection Reports

and photographs shall be increasingly communicated by e-mail, therefore all Inspectors will be expected to acquire the necessary resources to accomplish this objective in the shortest possible time. It is intended that subsequent revisions to any section of the Report Form will be distributed to Inspectors by e-mail.

In general, all Inspections shall include the following function tests on critical items:-

- Witnessing of fire drill, boat muster and lowering of at least one lifeboat, provided that local port regulations permit;
- Activation of main and auxiliary steering controls;
- Changeover and operation of emergency steering gear;
- Starting of emergency generator;
- Remote starting of emergency fire pump;
- Operation of a sample of ventilation fan dampers.

Content of Report Form

The Inspection Report is divided into ten sections namely:-

(i) **Vessel Data (SAFEDAT):** In addition to recording vessel data, Inspectors should ensure that that their recommendation is recorded and that the data sheet is signed and dated by the Inspector (also stamped) and by the Master or an Owner's representative.

(ii) **Summary of observations and action items (SAFESUM):** A copy of this page should be issued to the Master before the Inspector leaves the vessel. It is extremely important that any observation or deficiency requiring corrective action, or any item that is reported negatively in any of the following eight sections of the Report should be clearly highlighted in this summary section.

(iii) **Certificates and Documents (SAFECERT / SAFEDOC):** Original Certificates should be sighted along with the documents and publications required to be carried on board Bahamian vessels. It

is not necessary to physically check every document and publication, the presence of these may be verified by sampling and by sighting the ship's document check list. Note that further information relating to documents and publications required on Bahamian ships can be obtained from the publication "An Officer's Guide to the Merchant Shipping Legislation of the Bahamas", a copy of which should be on board.

(iv) **Navigation (SAFENAV):** Bridge organisation and procedures, passage planning and the professional application of ship handling and navigation practices should be evident. Bridge equipment and radio communications equipment should be witnessed as fitted and confirmed to be in good operating condition either verbally by ship's staff, by log book / test record entries, or by operation. Inspectors should ascertain that periodical checks of navigation equipment are made at sea. Inspectors are not normally required to test bridge equipment.

Bridge Procedures Guide and Standing Orders, including Master's Night Order Book, should be sighted to ascertain that all officers are certain as to their responsibilities.

Log books, passage planning and corrected charts should be inspected in order to ascertain whether actual procedures reasonably follow the vessel's Bridge Procedures Guide.

(v) **Manning & STCW (SAFECREW):** The vessel's actual manning should be checked to ensure that it meet the Minimum Safe Manning Certificate requirements. Also the schedule of watch-keeping and rest periods should be sighted to ascertain that normal work hours and rest periods are such as to minimise fatigue and comply with regulations. The ability of officers and crew to communicate in a common language should be noted, also the presence of English Language signs and notices around the vessel. The Official Log Book, Oil Record Books and Muster Lists must also be available in the English language.

Inspectors must check visually whether all officers possess valid certificates of competency and related Bahamian licences (watch-keeping officers) relative to their rank, including any required endorsements eg. dangerous cargo endorsement, pertaining to the particular type of vessel being inspected. Evidence of application for a Bahaman License should be available if a current licence is not held.

Where a radio officer is not carried (as permitted by the safe Manning Certificate) at least one deck officer, other than the Master, should be in possession of both a national and a Bahamian GMDSS Operator's Certificate.

A visual check should be made of officer and crew certification, training and documentation in order to ascertain that it is in accordance with STCW 95, bearing in mind the transitional arrangements, including familiarisation and basic safety training, GMDSS, fire fighting, survival craft, tanker safety, passenger ship training and medical care.

(vi) **Hull weather decks & superstructures (SAFEDECK):** For Pre-registration Inspections and Initial Inspections, safe conditions permitting, a careful examination should be undertaken [sic] selected hold spaces, cargo tanks, ballast tanks and void spaces for signs of damage, wastage, coating breakdown and indicative standards of maintenance.

During an Annual Inspection it is not normally necessary to carry out an in-depth inspection of the vessel's structure. It will be necessary to observe the general condition and appearance of the outer hull, deck plating, structures and fittings, ladder-ways, guard-rails, pipe coverings etc.

Signs of extensive damage, wastage, cracking, detachment, deformation or stiffening in decks and hull may warrant closer examination at the discretion of the Inspector. Any areas which

in the Inspector's opinion may give cause for concern should be photographed and noted in SAFESUM.

(vii) **Safety equipment (SAFEQUIP):** The effectiveness of life saving appliances depends on good maintenance by the crew and their use in regular drills. The lapse of time since the last Safety Equipment Survey can be particularly important if the equipment has not been properly maintained and regularly operated by the ship's crew.

A representative sample of lifesaving apparatus should be checked and an indication obtained that that the required number of life saving apparatus is on board.

With reference to lifeboats, Inspectors should check for obvious defects such as holed boats, seized components or malfunction of equipment. Checks should be made for signs of disuse of or obstructions to boat launching equipment; for example, paint accumulation, seizing of pivot points or braking devices, lack of greasing and poorly maintained blocks and falls may give cause for concern. Lifeboats should be correctly stored with fuel, food rations, water, spare parts and basic tools.

If in the opinion of the Inspector the life saving equipment onboard the vessel is considered to be below the required standard then this should be treated as a serious deficiency.

With regard to fire fighting equipment, the availability, condition and inspection dates of portable extinguishers, fire hoses, hose boxes and appliances, especially in the accommodation, galley and public areas is, particularly important.

Similarly, attention should be given to the effectiveness of escape routes by ensuring that vital doors are not normally locked and that alleyways and stairways are not obstructed.

The availability and condition of fire pumps and ventilation closing devices are to be regarded as being of primary importance to the fire-safety of the vessel.

If in the opinion of the Inspector the standard of fire fighting equipment and/or the fire risk onboard the vessel is considered to be unacceptable then these should be regarded as serious deficiencies.

ISM Code:

The ISM Code was introduced in order to ensure the safe operation of the ship and also provide a direct link with the most senior management via a "Designated Person".

The following ships are required to carry valid ISM Code certification:
All passenger ships, including passenger high speed craft, oil tankers, chemical tankers, gas carriers, bulk carriers and cargo high speed craft of 500 gross tonnage upwards

Other cargo ships and mobile offshore units of 500 gross tonnage and upwards will be required to carry valid ISM Code certification not later than 1 July 2002, though such vessels may have such certification ahead of the dead line

Inspectors should be familiar with the ISM Code and during their time onboard should note any inconsistencies with the requirements of the Code. It is necessary to confirm the presence of an ISM Safety Management System (SMS), however it is not necessary to examine the SMS documentation.

Inspectors are required to verify that the following ISM Code Certification is displayed in a prominent position: -

- A <u>copy</u> (photocopy or faxed copy) of the Document of Compliance (DOC), or Interim DOC, issued to the Company responsible for the safe operation of vessel and

- An <u>original</u> Safety Management Certificate (SMC), or Interim SMC, issued to the vessel.
- The name and location of the Designated Person Ashore (DPA)

Additionally, Inspectors are required to verify that:-

- The DOC and SMC are valid and have been issued on behalf of the Bahamas (not another administration);
- The DOC and SMC have been issued by either one of the eight BMA recognised Classification Societies, or an approved administration (this information should be obtained from the BMA);
- The name of the Company on the DOC and SMC is the same as that operating the vessel, and whose Safety Management System documentation is onboard;
- The DOC specifies that the Company is permitted to operate the type of ship that is being inspected;
- The ship particulars on the SMC are correct;
- Except for Interim ISM Certificates, that Page 2 of the DOC and SMC have been endorsed, indicating that periodical audits have been carried out in a satisfactory manner and the validity of the DOC and SMC is being maintained.

  Note: a +/- 3 month window is applicable for annual company audits

(viii) **Machinery Spaces (SAFENG):** The condition of the machinery and electrical installations should be such that they are capable of providing sufficient continuous power for propulsion and auxiliary services. Through consultation with personnel along with a careful inspection of the machinery spaces, Inspectors should ascertain the availability of standing orders and emergency procedures, the availability of critical machinery,

safety & fire-fighting systems, the presence of effective pollution prevention control measures and that safe working practices and procedures are being adhered to. During the inspection of the machinery spaces the Inspector should form an impression of the standard of house-keeping and maintenance being practised.

(ix) **Passenger Ship supplement (SAFEPASS):** This supplement should be used, in addition to the foregoing sections, when inspecting Passenger Vessels or Passenger Ro-Ro Vessels.

Inspectors should familiarise themselves with the vessel's fire detection and alarm systems, fire fighting systems, fire door and watertight door arrangements. Test records should be sighted to ascertain that all equipment is being tested periodically. Sample function testing of fire and water-tight doors and alarms should be carried out, as well as a general visual inspection to ascertain that good standards of maintenance are being applied.

Communication systems, signals, notices, and guidance to passengers in the event of an emergency also need to be to the satisfaction of the Inspector. Emergency exits, particularly from public spaces, should be seen to be unobstructed and not able to be locked under any circumstances.

Procedures for crowd control, mustering and evacuation should be witnessed and there should be evidence, probably log entries, that the procedures are being followed in practice and that drills are held onboard as necessary.

(x) **Oil and Chemical Tankers, Gas Carrier supplement (SAFETANK):** Before entering a pump room or other enclosed space the atmosphere should be tested in the presence of the inspector with portable gas /O_2 analysers.

Particular attention should be paid to pump rooms on oil and chemical carriers and to cargo compressor rooms on LPG/LNG carriers. All pump and compressor seals should be tight with no leakage, ventilation systems should be working at the time of the

inspection, light fittings and switches should be of an approved gas tight type, bilges should be clean. Ventilation flaps or devices should be operable. If the cargo-pump or compressor prime movers are located in the engine room or in a separate motor room then bulkhead seals should be in good condition and free of leakage.

If the inert gas plant is in use at the time of inspection, the plant, deck non-return valve and deck seal should be inspected and the oxygen recorder / alarm in the CCR should be sighted. The inert gas log for previous voyages should be inspected in order to check the O_2 levels under normal running conditions.

The Emergency Shut Down (ESD) system test log should be sighted to ensure that the ESD is working satisfactorily.

On tankers, the cargo venting system, PV systems, IG lines, mast risers, high velocity vents and vent stacks should be seen to be in a satisfactory condition.

In gas carriers tank domes and associated fittings and deck pipelines should be in a satisfactory physical condition and free of leakage and gas detectors should be operational as shown on the test and calibration records.

Appendix B - Accident Investigation

Administration of investigations

All matters relating to accidents to ships and investigation of accidents should be addressed to the London office of the Authority. The emergency number is available for urgent out of office hours communications.

Notification of accidents

Shipowners and shipmanagers are required by section 191 of the Merchant Shipping Act to notify the Bahamas Maritime Authority of accidents to ships involving serious injury or loss of life or where a

ship has sustained material damage affecting seaworthiness. Inspectors are also requested to bring to the attention of the Authority any casualties which may come to their attention. A form for reporting of casualties by masters is available. Information on casualties may however be submitted in any form, and by the most direct means.

Investigation

On receipt of advice of a casualty, a decision will be made as to the scope of the investigation required. In case of minor casualties, involving no loss of life or serious damage to the ship, it may not be necessary to conduct an on site investigation. In other more serious cases, an investigation will be carried out by an inspector on behalf of the Authority. In such cases, arrangements will be made with the inspector, who will be authorised to conduct the investigation. Guidance on the scope and extent of the investigation, will be issued to the inspector concerned. In all cases the objective of investigations are to:

- Establish the facts
- Determine the cause of the casualty
- Identify any measures which might prevent a recurrence

Inspectors costs incurred in accident investigations carried out at the request of the Authority should be recovered from the owner of the vessel concerned.

Report of investigation

On completion of an investigation, a report should be submitted as soon as possible to the Authority. The report should include:

- Particulars of the vessel
- Factual narrative of events
- Comment and conclusions
- Any recommended preventative measures

- Annexes, containing, where appropriate, copies of original documents such as charts, log books, certificates, photographs etc.

Major casualties

In case of major high profile casualties, officers of the Authority will attend to conduct the investigation, and may request the assistance of local inspectors in such cases.